U.S. Department of Labor

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Issue Date: 11 June 2007

CASE NO.: 2004-LHC-00212

OWCP NO.: 18-76563

In the Matter of:

H.S.,
Claimant,
v.

KINDER MORGAN, INC.,
Employer,
and

LIBERTY MUTUAL INSURANCE CO.,
Carrier.

Appearances:

David Utley, Esq.
For Claimant

Lisa M. Conner, Esq.
For Kinder Morgan, Inc. and Liberty Mutual Insurance Company

Before: Gerald M. Etchingham
Administrative Law Judge

AMENDED SUPPLEMENTAL DECISION ON REMAND AWARDING BENEFITS AND ATTORNEY'S FEES FOR LEFT KNEE INJURY

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"), and the regulations promulgated thereunder. A formal hearing was held in Long Beach, California, on May 24, 2004. The parties called witnesses, offered documentary evidence and submitted oral arguments. The following exhibits were admitted into evidence at hearing: Claimant's exhibits ("CX") 1-10, Employer's exhibits ("EX") 1-24 and Administrative Law Judges exhibits ("ALJX") 1-4. TR at 32-36.[1] Claimant's Exhibit 10 is the deposition of Dr. Hajj and was admitted at hearing prior to it having been taken. TR at 32. In addition, ALJX 5 and ALJX 6, consisting of the closing briefs of Claimant and Employer, respectively, were filed and admitted into evidence on August 16, 2004, thereby closing the record. The surveillance tapes offered by Employer at trial were

[1] The abbreviation "TR" refers to the hearing transcript.

properly authenticated as to portions relating to surveillance performed on September 18 and 19, 2003 and the part relating to Claimant's black belt exam for karate, but not as to the surveillance performed on July 14 and 15, 2003.[2] TR at 58-89. Finally, on March 28, 2005, Claimant's counsel submitted his petition for attorneys' fees and costs. On April 12, 2005, Employer's counsel filed its statement of objections to Claimant's petition for fees and costs.

On January 25, 2005, I issued a Decision and Order ("my prior Decision") awarding Claimant medical benefits with respect to his left knee injury but denying disability compensation benefits based on that injury because the claim for benefits was untimely filed pursuant to subsection 12(a) of the Act. On March 7, 2005, I issued an order modifying my prior decision.[3] Thereafter, the parties appealed my prior Decision to the Benefits Review Board ("BRB"). The BRB issued its non-published decision and order dated April 6, 2006, affirming my prior Decision with respect to the award of medical benefits but vacating my initial finding that Employer was prejudiced by the untimely notice of Claimant's left knee claim.

The BRB noted that the record contains relevant evidence that was not fully discussed by me that Employer was able to effectively investigate the left knee claim. Consequently, the BRB vacated my finding that Claimant's claim for disability benefits based on the left knee injury was barred by section 12 of Act due to his failure to provide timely written notice of the claim. The BRB then remanded the case to me for further consideration consistent with its opinion. On March 28, 2007, the BRB denied Employer's request for reconsideration of its April 6, 2006 decision.

On May 31, 2007, I issued a Supplemental Order on Remand Awarding Benefits and Attorney's Fees for Left Knee Injury (the "May 31 Remand Decision"). The May 31 Remand Decision contained data processing errors exclusive to this Office's document management system and did not effect the substance of the May 31 Remand Decision in any way. As a result, this amended supplemental decision on remand simply corrects the data processing errors and leaves the prior May 31 Remand Decision in full force and effect.

In what follows, I shall reconsider whether Employer produced substantial evidence that it was prejudiced by Claimant's lack of timely written notice of his left knee claim. For ease of reference, I have incorporated here my prior Decision as modified by my order granting Employer's motion for reconsideration. My discussion of Section 12(d)(2) of the Act and the resulting order awarding Claimant temporary total disability benefits commencing on August 18, 2003 and further awarding reasonable attorneys' fees and costs is based on the BRB's decision of April 6, 2006.

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[2] Employer authenticated the surveillance tape for September 18 and 19, 2003 by placing sub rosa investigator Richard Ramirez of Horseman Investigations on the stand. TR at 51; EX 20. TR at 52. Employer withdrew the portion of the surveillance tape which followed Claimant on July 14 and 15, 2003. TR at 54. After hearing, Employer supplied this Office with an edited version of the tape. *See* TR at 59.

[3] Timely motions for reconsideration of my prior Decision were filed by both parties. On March 7, 2005, I issued an order (1) modifying my prior Decision, (2) denying Claimant's motion for reconsideration, and (3) granting Employer's motion for reconsideration.

FURTHER FINDINGS OF FACT & CONCLUSIONS OF LAW ON REMAND

STIPULATIONS

The parties have stipulated, and I find, the following:

1) This matter is within the jurisdiction of the Act. TR at 36.
2) An employee/employer relationship existed at time of the alleged injury. *Id.*
3) Claimant's average weekly wage at the time of the alleged injury was $1,275.00 which would result in a compensation rate of $850.00. *Id.*
4) Claimant has not reached permanent and stationary status. TR at 37.
5) Claimant ceased working for Employer between September 5, 2001 and September 7, 2001. TR at 42.
6) Claimant gave Employer notice that Claimant had injured his left knee via letter sent by Claimant's counsel to Employer's counsel on June 17, 2003. TR at 43.
7) On July 3, 2003, Claimant amended his previous right knee claim with the Department of Labor to include an injury to his left knee. TR at 43.
8) Claimant's temporary total disability began on August 18, 2003, with respect to his work-related left knee condition. Claimant's Motion for Reconsideration, February 4, 2005.

Because I find that there is substantial evidence in the record to support the foregoing stipulations, I accept them. *See* CX 1-10; EX 1-24.

FURTHER FACTUAL BACKGROUND

Mr. H.S. is a 59 year old married man with a hearing impairment. TR at 61. He was deposed on August 30, 2002, April 14, 2003, September 12, 2003, and testified at the hearing on May 24, 2004. *See* TR at 60-129; EX 17.

Claimant last worked for Employer between September 5 and 7, 2001. Stip. Fact No. 5; TR at 42. Employer received notice of Claimant's left knee claim on June 17, 2003, when Claimant's counsel wrote to Employer's counsel to request Employer to authorize a second opinion by Dr. Kharrazi of Dr. Hajj's recommendation that Claimant undergo left knee surgery. Stip. Fact No. 7; CX 6 at 53. Claimant filed a claim for left knee injury on July 3, 2003, when Claimant's attorney revised the LS-203 that had previously been filed with the Department of Labor ("DOL"), Office of Workers' Compensation Programs ("OWCP"), Longshore Division in 2001, for a work-related cumulative trauma injury to his right knee. Stip. Fact No.6; EX 16 at 233.

Claimant underwent a work-related right total knee arthroplasty surgery on September 11, 2001, which was performed by Dr. Ahmad Hajj at the Garden Grove Hospital and Medical Center in Garden Grove, California. TR at 70; EX 3 at 24. Claimant previously had arthroscopic surgery to his right knee in August 1999 after an injury he sustained playing racquetball, and a second arthroscopic surgery to his right knee in the year 2000 after tripping over a hose.[4] TR at

[4] Unless otherwise noted, all references to the "right knee surgery" describe the September 11, 2001 total right knee arthroplasty surgery.

93; EX 17 at 50-51. He testified that he did not notice an altered gait after the August 1999 or 2000 surgeries. TR at 93.

Claimant testified that his left knee began bothering him in 1999. TR at 67. Claimant also stated that he had experienced pain in his left knee for approximately 5 to 6 years prior to the date of his September 2003 deposition and had never had surgery on his left knee. EX 17 at 282. On January 18, 2001, Claimant had x-rays taken of both his knees and a Dr. Gurprem S. Kang remarked that the "degenerative changes of both knee joints consistent with osteoarthritis; mild to moderate narrowing of the lateral compartment on the right; mild to moderate narrowing of the medial compartment on the left." EX 3 at 23.

Claimant testified that before the right knee surgery in September 2001 both knees hurt from arthritis but that his left knee symptoms were minimal and not bad enough to warrant surgery at that time. He said he did not pay much attention to the left knee symptoms because his right knee hurt very badly. TR at 67. He also testified that he noticed that the pain in his left knee began to increase between September of 2002 and March of 2003. EX 17 at 316.

Claimant also suffered from carpal tunnel syndrome in his right wrist for which he underwent release surgery. TR at 68. After the third right knee surgery Claimant testified that he used a specially designed walker that had an attachment on the right side on which he could rest his right forearm so as to avoid gripping the walker with his right hand. TR at 68. Immediately after his right knee surgery Claimant testified that he was walking with the aid of a walker and limped from not being able to put much weight down on his right knee, and that he put all of his weight down on his left leg. TR at 69. Claimant testified that he used the walker for four to eight weeks. TR at 69, 70. Claimant testified that he then used a cane for about a month and still had an altered gait when he walked, placing significantly more weight on his left leg then his right. TR at 71.

Dr. Paul G. Johnson was Claimant's treating physician from approximately 1992 until at least 2002. EX 10 at 135. On June 4, 2002, at Claimant's request, Dr. Johnson drafted a letter explaining that Claimant had serious medical problems including severe osteoarthritis in his left knee that would soon result in the left knee needing to be replaced. EX 10 at 135-6. Claimant indicated that this letter was in support of his filing for Social Security Disability and that the disability "included his left knee." TR at 111.

Claimant testified that his gait was still affected in 2004 partly because after the right knee surgery, a bandage was tied too tightly resulting in damage to the perineal nerve in his right leg. TR at 73. Claimant testified that his right leg still hurts constantly, his right knee still feels like it is swelling, and the bottom of his foot feels like "there's a big hunk of meat in there that just goes up to [his]… big toe." TR at 73.

Claimant testified that he had been participating in country line dancing about once a week for the last 7 or 8 years except he did not go for the about a year following his right knee surgery. TR at 77, 79. Before his knees began bothering him, he would dance the entire 3 or 4 hours. TR at 79. After his surgery in 2001, he testified that he was limited to about 3 or 4 short

dances and mostly socialized because the dancing hurt his knees. TR at 80. He testified that his knees always hurt even from just walking or standing. TR at 81.

Claimant obtained his seventh degree black belt in Kenpo karate (the Chinese American form of karate) on April 15, 2002. TR at 82; EX 18 at 433. He had been involved in Kenpo karate for nearly 40 years and had been training under instructor Chuck Sullivan for the last 8 to 10 years. TR at 83. Claimant testified that he practiced his karate with the instructor about once a week for two hours but that since the right knee surgery he did not attend every class and did not stay for the full two hours of many of the classes he did attend. TR at 86. After his right knee surgery, he no longer participated in freestyle sparring lessons which involved controlled contact fighting. TR at 87.

Claimant testified that in order to advance in degrees he had to pass tests in performing the forms and techniques required. TR at 85. He testified that he performed the required kicking in order to obtain his sixth degree black belt in 1998[5] but that since his right knee surgery, he was no longer tested for mastery of the forms and techniques that involved kicking. TR at 85, 91.

He further testified that for the seventh degree black belt test on April 15, 2002, he was required to make 52 stance changes in less than three minutes and these caused him pain. TR at 104. For the test, he wore a knee brace on his right knee but not his left. TR at 104. His instructor testified that Claimant had not done the kicks or most of the stances that would normally have been required for the seventh degree test but that Claimant is allowed to progress because his value goes beyond his physical ability to do the moves. EX 17 at 431, 439.

Claimant testified that he has ridden motorcycles for nearly 20 years and owns a Harley Davidson which he still rides occasionally. TR at 100. Claimant also testified that he works out at a gym and prior to his third right knee surgery in 2001, he was lifting 2 or 3 times a week. *Id.*

The last job Claimant held was working as a gauger or roustabout at Kinder Morgan ending on or about September 6, 2001,[6] a few days before Claimant underwent a total knee replacement surgery for his right knee. TR at 61.

Claimant testified that as a gauger he had to set up pipeline runs, and "frequently" climb the stairs to the "big tanks" and gas tanks in order to gauge them. He also had to carry equipment up and down the stairs in order to perform this gauging of the tanks. TR at 62. The tanks are about five or six stories high. EX 17 at 393.

Claimant testified that his gauging job consistently involved heavy lifting, particularly of hoses that connected on the ships to head gaskets on the docks and could weigh up to 1,000 pounds. TR at 62-63. He mostly used a crane and dolly to move the hoses but had to sometimes physically "get over and straddle them and lift them up to connect to the pipeline," or lift the hoses onto the dolly or sometimes maneuver them as they hung from a hoist, which could have

[5] Claimant obtained his sixth degree black belt on November 23, 1998. EX 18 at 436.

[6] Both parties stipulated that Claimant ceased working at Employers between September 5 and 7, 2001. Stip. Fact No. 5; TR at 42.

involved lifting 100 or 200 pounds. TR at 63-64. He estimated that he often had to lift 10 to 15 pound items. TR at 62. Sometimes when a ship had to be tied to the dock, Claimant and 6 or 7 other men had to carry the large metal cables used to tie the ship to cleats on the dock. TR at 63.

Claimant also testified that his work at Kinder Morgan "frequently" required him to kneel in order to clean under pipelines or hook up a hose. TR at 65. He testified that this work "always" required him to squat, sometimes squatting and hanging over the edge of a boom boat to connect the booms to the ships. TR at 66. He testified that he "sometimes" had to work in awkward positions relative to his legs, especially when cleaning under the pipelines. TR at 66.

Claimant testified that after Dr. Hajj recommended left knee surgery, Claimant's counsel sent a letter to Employer's counsel dated June 17, 2003, requesting authorization for a second opinion and enclosing Dr. Hajj's medical reports in which recommended knee surgery. TR at 43.

On January 28, 2004, Dr. John P. Kelly performed a left knee arthroscopy with partial meniscectomy and chondroplasty. CX 3 at 30. The operative report indicated that Dr. Kelly found an "obvious complex tear of the medial meniscus" and that the left knee had progressed to bone on bone in places. *Id.* His post-operative impression was that Claimant suffered from mild to moderate degenerative changes. EX 3 at 32.

Dr. Ahmad Hajj[7]

Dr. Ahmad Hajj is a board-certified orthopedic surgeon who has practiced medicine for over 25 years. CX 1 at 1. He has held fellowships in hand surgery and at the Mayo Clinic in Rochester, Minnesota. *Id.* He has had a private orthopedic practice Santa Ana, California since around 1988. *Id.*

Claimant's family physician, Dr. Johnson, referred Claimant to see Dr. Hajj before January 2001. TR at 98. Dr. Hajj first saw Claimant on January 18, 2001 on a non-industrial basis to address Claimant's complaints concerning pain in his right knee and carpal tunnel syndrome in his right wrist. EX 19 at 464. At the time, Dr. Hajj and Claimant did not address the left knee or its work-relatedness because the right knee and carpal tunnel syndrome were the primary complaints. EX 19 at 465.

Dr. Hajj's report dated December 27, 2001 and entitled "Comprehensive Orthopedic Evaluation" includes a detailed medical history and indicates that at their first meeting, Claimant complained of chronic pain in both knees and informed the doctor that he had undergone previous knee surgeries – one on his left knee in January 2000 to remove excess cartilage and a second on his right knee in August 1999. EX 19 at 467. In the same report, under a section on "Causation/Apportionment," Dr. Hajj indicated his belief that Claimant's job aggravated and accelerated his symptomology. EX 19 at 468. Dr. Hajj testified that although this statement referred to the symptoms present in both knees, he was primarily concerned with Claimant's right knee complaints. EX 19 at 468.

[7] In the trial transcript, Dr. Hajj is improperly referred to as "Dr. Hodge."

On September 11, 2001, Dr. Hajj performed a right knee total arthroplasty, a lateral patella release, and right carpal tunnel release surgery. EX 19 at 461. The discharge summary indicates that Claimant's postoperative recovery "was generally uneventful." EX 3 at 52.

Dr. Hajj examined Claimant many times following the right knee surgery, including: February 26, 2002, April 23, 2002, May 16, 2002, July 11, 2002, August 8, 2002, September 5, 2002, October 3, 2002, November 7, 2002, December 5, 2002, December 12, 2002, December 19, 2002, January 16, 2003, February 13, 2003, March 18, 2003, April 1, 2003, April 17, 2003, July 8, 2003, august 5, 2003, September 9, 2003, October 7, 2003, November 4, 2003 and December 9, 2003. EX 19 at 471; CX 1.

Dr. Hajj testified that Claimant's recovery from the September 11, 2001 right knee surgery was delayed due to continued pain in Claimant's right foot that Dr. Hajj believed may have been secondary to nerve compression in Claimant's right knee. EX 19 at 472.

During the September 5, 2002 examination, Dr. Hajj reported that Claimant continued complaining about complications surrounding his right knee and complained about symptoms in his left knee. EX 19 at 472. Dr. Hajj testified that he knew all along that Claimant's problems with his knees stemmed in large part from arthritis. EX 19 at 473. On November 7, 2002, Dr. Hajj took x-rays which revealed that Claimant suffered from unusually severe arthritis in his left knee, "not expected in somebody of his age." EX 19 at 473.

Dr. Hajj testified that the left knee problem became more pronounced after Claimant had right knee surgery on September 11, 2001, because Claimant was unable to walk normally on his right knee. This put more stress on his left knee. EX 19 at 460. Dr. Hajj stated that he first discussed this idea with Claimant around April 2003. EX 19 at 492.

Dr. Hajj stated in his July 7, 2003 report that:

> I do believe that patient at this time has developed significant compensatory left knee pain secondary to his right knee total arthroplasty with significant limping. Although he already had pre-existing degenerative chondromalacia of the left knee, I do believe his symptoms have been accelerated significantly due to his right knee industrial injury and he has developed significant left knee pain.

EX 9 at 25.

Dr. Hajj administered a series of injections into Claimant left knee: Celestone and Lidocaine injections on March 18, 2003; Cortisone injection on July 8, 2003; Cortisone injection on August 5, 2003; Celestone and Lidocaine injections on September 9, 2003; and Depomedrol and Lidocaine injections on November 4, 2003. *See* CX 1.

Dr. Hajj testified that he was not aware that Claimant line danced. He said he knew that Claimant was involved in "playing karate," but was under the impression that Claimant had not been participating in karate since the September 11, 2001 surgery. EX 19 at 476.

Dr. Hajj admits that he is not very good at drafting reports and prefers to work off of his notes. EX 19 at 477. Dr. Hajj's March 18, 2003 notes are the first of his reports to indicate that Claimant's left knee injury was aggravated, worsened or injured by Claimant's recovery period following the right knee injury. EX 19 at 481.

Dr. Hajj currently recommends a left knee arthroplasty to replace the left knee either partially or totally. EX 19 at 485-6. He stated that the available medications did not alleviate Claimant's condition including injections of Synvisc, a lubricant-like material, and Cortisone. *Id.* He testified that Claimant would have needed left knee surgery eventually whether he had worked with Employer or not, but that the employment activities aggravated the left knee condition and hastened the need for surgery. *Id.* Dr. Hajj stated that Claimant would need at least 6 months to rehabilitate after the left knee surgery, including 3 months of physical therapy. *Id.*

Dr. Daniel Kharrazi

Dr. Kharrazi is an orthopedic surgeon and is board-certified as a Qualified Medical Examiner. CX 2 at 16. He holds a fellowship in sports medicine surgery and one in adult hip and knee reconstruction. CX 2 at 15. Dr. Kharrazi did his residency at Harvard Medical School before becoming the staff orthopedic surgeon there for six months in 1997. CX 2 at 15. Claimant was examined by Dr. Kharrazi on July 7, 2003 and a report was issued on the same date. CX 2 at 19. The report indicates that Claimant related that he first began developing left knee pain in January 2003. CX 2 at 20. Claimant related frequent pain in his left knee, on the back side of the knee and under the knee cap. *Id.* According to Dr. Kharrazi's report, "[t]he pain increases with walking or standing over 5 minutes, flexing and extending the knee, climbing or descending stairs. Additionally there is grinding and clicking sensation in the left knee." *Id.*

Dr. Kharrazi's report omits any reference to Claimant's previous left knee surgeries. *Id.* at 21. The examination did not reveal any atrophy in Claimant's left quadriceps. *Id.* at 22. Dr. Kharrazi's diagnostic impression was left knee degenerative chondromalacia and arthritis, and that there is "compensatory left knee pain secondary to limping because of right total knee replacement." *Id.*

Dr. James T. London

Dr. London first examined Claimant on February 13, 2002. Claimant did not complain about his left knee and Dr. London observed that Claimant was walking with a right-side antalgic gait. EX 24 at 6, 32. Dr. London defined an antalgic gait as "a gait where you spend less time, in the stance phase of the gait, on the one side versus the other." EX 24 at 33. The doctor did not notice that Claimant had a left-side altered gait during these visits. EX 24 at 33. Dr. London examined Claimant again on April 13, 2003, and obtained x-rays of Claimant's left knee. EX 24 at 8, 32. The x-rays revealed a "narrowing of medial joint space to 2 millimeters . . . ," indicating significant loss of cartilage. EX 24 at 8. Dr. London opined that a man of Claimant's size would normally have about 7 millimeters of medial joint space. EX 24 at 8. Dr. London did not recommend surgery at that time. EX 24 at 12. Dr. London testified that the x-rays were "most consistent with what's called osteoarthritis, which is the typical . . . type of arthritis that if you

live long enough most of us will get in at least some of our joints," and that Claimant's condition was worse than the "usual person his age, the average person." EX 24 at 9.

Dr. London testified that arthritis is primarily caused by genetics and often runs in families, but is also linked to aging. EX 24 at 10. For mostly this reason, Dr. London opined that active physical work did not necessarily cause Claimant's osteoarthritis. EX 24 at 11. Dr. London stated that if the left knee condition were "related to the stresses on the joints in his lower extremities, you would expect to see it in his hips and ankles; but instead we have . . . no symptoms referable to his hips or ankles, joints that are exposed to the same stresses as the knees." EX 24 at 15.

Dr. London saw Claimant again in October 2003. Claimant complained of constant sharp pain in the anterior and posterior aspects of the left knee that occasionally radiates into the left buttock. EX 24 at 13. Claimant had not complained of constant pain or pain in the buttocks during his April 2003 examination. EX 24 at 13. Following the October 2003 examination, Dr. London agreed with Drs. Hajj and Kharrazi that Claimant needed a left total arthroplasty surgery. EX 24 at 15.

However, Dr. London testified that he did not agree with Dr. Hajj and Dr. Kharrazi in their diagnoses that Claimant's left knee symptoms were aggravated by his overcompensating for his weaker right knee following the September 11, 2001 surgery. EX 24 at 13. Dr. London testified that the right knee surgery would have actually decreased the amount of stress Claimant placed on his left knee because Claimant would have been less active while he recovered from his right knee surgery and his altered gait alone was not significant. EX 24 at 14.

Dr. London testified that:

> When I say there was a decrease in his activity level, I mean he took fewer steps and went shorter distances less frequently than he would have if he hadn't had surgery on September 11, 2001. The disability imposed on him by his right knee would limit the activities placed on his left knee. The other thing is his gait was a very short-strided (*sic*) gait on both sides, because he had pain on both sides; and that type of gait would not aggravate his left knee. The third thing is he spent a considerable period of time using external support devices, crutches and the like, after his surgery; and he would have periods of confinement after that, that would further reduce his overall activities and take the stress off of his left knee.

EX 24 at 14. Dr. London further testified that Claimant's use of an external support device would have reduced the amount of weight he was placing on his left knee, the support leg, by about 50 percent. EX 24 at 15.

Dr. London watched the film of Claimant taking his karate test for the seventh degree black belt and testified that those activities performed over time could aggravate the left knee arthritis. EX 24 at 17. Dr. London also testified that certain activities would aggravate osteoarthritis such as "impact loading"—jumping, cutting, running, changing directions—and "cutting"—jumping down, jumping up, and resisted exercise with weights. EX 24 at 21. Dr.

London testified that activities such as walking, normal stair climbing, getting in and out of cars, and bending over, do not exceed the limits that arthritic cartilage can tolerate and are actually helpful to the condition. *Id.* He testified that Claimant's activity level following the September 11, 2001 surgery may actually have helped his knee condition. EX 24 at 19. Contrary to general belief and the belief of some in the medical community, Dr. London opined that exercise stimulates cartilage much like it stimulates other living tissues, such as muscles, tendons, and bone, to grow. This is because cartilage is made of collagen which gets stronger when you exercise. EX 24 at 19. Dr. London also testified that exercise would not help re-grow cartilage if no cartilage is left or the joint is "bone on bone" and, in such a case, Claimant would have to opt for surgery when he could no longer take the pain. EX 24 at 20.

Dr. London testified that when an individual aggravates the cartilage in a joint such as a knee, he would usually experience immediate pain and/or increased swelling or stiffness within the same day or next day. EX 24 at 30-31.

DISCUSSION

CREDIBILITY

I am entitled to determine the credibility of the witnesses, to weigh the evidence and draw my own inferences from it, and I am not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). In addition, as the fact-finder, I am entitled to consider all credibility inferences, and can accept any part of an expert's testimony or reject it completely. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

I found Claimant's testimony less than credible with regard to his left knee pain and his reported medical histories to various physicians. For example, Claimant testified that his left knee began bothering him in 1999 and that before his right knee surgery in September 2001, he experienced pain in both of his knees. TR at 67. Claimant also testified that he had experienced left knee pain for approximately 5 to 6 years prior to his September 2003 deposition, and that he had never had surgery on his left knee. EX 17 at 282. Yet in December 2001, Claimant informed Dr. Hajj that he had undergone surgery on his left knee in January 2000. EX 19 at 467. Claimant even instructed Dr. Johnson to write a letter to the Social Security Administration in June 2002 in an attempt to obtain social security benefits based on, among other things, his left knee disability, as Dr. Johnson opined that Claimant's left knee would soon need to be replaced. TR at 111; EX 10 at 135-36. In contrast, Claimant met with Dr. Kharazzi in July 2003 and reported that he first developed left knee pain in January 2003. CX 2 at 20. Dr. Kharrazi's July 2003 report omits any reference to Claimant's previous left knee surgeries. CX 2 at 21. None of Claimant's examinations with Drs. Hajj, London, or Kharrazi contained specific reference to the frequency or extent to which Claimant continued to participate in country line dancing, karate, and motorcycle riding.

Based on the foregoing inconsistencies in and contradictions of Claimant's statements, I find that he was not a credible witness and I therefore accord little weight to his testimony. Similarly, I discount Dr. Kharrazi's opinions concerning Claimant's left knee condition, as they were based on an incomplete and/or inaccurate medical history as well as a misleading history concerning Claimant's ability to participate in line-dancing, karate, and motorcycle riding. Moreover, I discount the medical opinions of Dr. Hajj and Dr. London to the extent they are inconsistent with Claimant's medical history and life activities.

THE SECTION 12 ISSUE

a. The Section 12(a) Bar

Initially, it must be determined whether Claimant's left knee condition is classified as an "occupational disease" or a traumatic injury, as there is a different notice requirement under Section 12 depending upon the classification. While the Act does not define what constitutes an "occupational disease," courts have generally defined it as "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2d Cir**.** 1989). Occupational diseases have a gradual onset, although the fact that a condition gradually develops does not automatically make it an occupational disease; a cumulative injury gradually developing over a long period of employment may be classified as an accident. *See Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 623 (9th Cir. 199l); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219 (1991); *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984).

Claimant does not allege that his left knee injury occurred due to work hazards present in a peculiar or increased degree at Employer as compared to other employment in general. Also, the BRB has stated that activities such as repeated bending, stooping, and climbing are not "peculiar to" a specific job but are common to many occupations and to life in general. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 173 (1989). Consistent with this principle, I find that Claimant's left knee condition is a traumatic injury and therefore apply the statute of limitations located in Section 12(a) for traumatic injuries.

Section 12(a) provides that:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment.

33 U.S.C. § 912(a). The limitation period does not begin to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970).

Employer contends that Claimant's claim is barred pursuant to section 12(a). Employer argues that Claimant knew, or with the exercise of reasonable diligence should have known, that his left knee injury was work-related and would affect his earning capacity before June 4, 2002. Employer asserts that Claimant's notice to the Employer on June 17, 2003 was therefore untimely.[8] Claimant contends that was not required to provide notice to Employer when he developed the left knee condition because it was related to an injury for which Employer already received timely notice.

I find that Claimant, in the exercise of reasonable diligence, should have been aware of his left knee injury, its work-relatedness and the potential impact it would have on his wage-earning capacity well in advance of thirty days prior to the June 17, 2003 notice Claimant provided to Employer. *See* 33 U.S.C. § 912(a) (requiring notice be given thirty days after the employee is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury and the employment). The preoperative report prepared following Claimant's surgery on September 11, 2001 reflects that Claimant knew his left knee was injured at that time.[9] I find that Claimant, having known that the arthritis in his right knee was work-related, should have reasonably assumed that the same or similar condition in his left knee was also work-related. Claimant listed his left knee amongst a variety of ailments he contended were disabling in Dr. Johnson's June 4, 2002 letter, which stated that Claimant's left knee would soon need to be replaced. *See* EX 10 at 135-36. I also find that Claimant should have realized that his left knee injury would impact his future earning capacity by June 4, 2002, when he instructed Dr. Johnson to write on his behalf that his left knee would soon need to be replaced and that Claimant could not work. *See* EX 10 at 135-36.

I find that Claimant, in the exercise of reasonable diligence, should have been aware that his left knee injury was work-related for purposes of Section 12 by no later than June 4, 2002. As previously noted, this is well in advance of thirty days prior to the June 17, 2003 notice Claimant provided to Employer. I further find that there was no excuse for Claimant's failure to give Employer timely notice of his left knee claim.

b. Section 12(d) Exceptions

Consistent with the above analysis, Claimant's left knee injury claim is barred by Section 12(a) unless written notice is excused under Section 12(d). Section 12(d) excuses a claimant's lack of notice if Employer *knows* of the injury during the filing period (the "knowledge requirement"),[10] or through a finding that employer was not prejudiced by their lack of knowledge. 33 U.S.C. § 912 (d).

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[8] The parties stipulated that Claimant provided notice of his left knee injury to Employer on June 17, 2003, by letter from Claimant's counsel to Employer's counsel. Stip. Fact No. 7; TR at 43.

[9] The preoperative admission report states that Claimant is "a 56-year-old gentleman… known to have had traumatic arthritis in both knees for many years. He underwent prior arthroscopic debridement in both knees which gave temporary relief." EX 9 at 132.

[10] Please note the distinction between my use of the terms "notice," "awareness," and "knowledge." For example, Claimant is required to provide "notice" of his injury to the Employer under Section 12(a) within 30 days of

1. Employer Did Not Have Knowledge of Claimant's Left Knee Injury to Excuse the Lack of Notice

For the knowledge prong to excuse claimant's lack of notice, the BRB and courts generally require that the employer have knowledge of not only the fact of Claimant's injury, but also of the work-relatedness of that injury. *Jackson v. Ramsey*, 15 BRBS 299, 303 (1983). Knowledge may be imputed to the employer if it can be shown that the employer "knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation into the matter is warranted." *Id.* at 303. *See also Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

Claimant points to Dr. Hajj's December 27, 2001 report in which he opined under the "Causation/Apportionment" section that Claimant's "job has aggravated and accelerated his symptomology." EX 3 at 44. Claimant argues that that report was received by Employer on January 29, 2002, as evidenced by the handwritten initials and date notation of Employer's attorney, William N. Brooks II, which appear in the upper left hand corner of the photocopy company's cover sheet. Claimant also argues that Dr. Hajj's December 27, 2001 opinion was recounted in Dr. London's March 13, 2002 report to Employer. EX 3 at 19-30.

I find that Dr. Hajj's December 27, 2001 statement does not support a finding that Employer had the requisite "knowledge" of the left knee injury under Section 12(d). The causation statement, read in isolation, does not indicate whether it was referring to Claimant's left or right knee. EX 3 at 44. A complete reading of Dr. Hajj's December 27, 2001 report indicates that Dr. Hajj was in fact concentrating his evaluation on Claimant's right knee. Specifically, Dr. Hajj primarily noted Claimant's right knee pain and only physically examined Claimant's right knee. EX 3 at 41-43. Furthermore, Dr. Hajj clarified his statement at his September 13, 2003 deposition; he explained that he was referring to Claimant's right knee when he opined about causation. EX 19 at 469-470.

Dr. Hajj first opined about the cause of Claimant's left knee injury in his report dated March 18, 2003, when he stated that the left knee injury was aggravated, worsened or injured by Claimant's right knee injury. EX 19 at 481. Dr. Hajj testified that he first discussed this idea with Claimant around April 2003. EX 19 at 492. Dr. Hajj did not express an opinion about the work-relatedness of the left knee condition until he was specifically asked about it by Claimant's attorney at his September 11, 2003 deposition. EX 19 at 491-492.

After reviewing the evidence and Dr. Hajj's December 27, 2001 report, and for the reasons stated above, I find that neither Dr. Hajj's report nor his deposition testimony show that Dr. Hajj opined that Claimant's work for Employer caused or aggravated his left knee condition any earlier than March 2003.

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becoming "aware" that the traumatic injury is work-related unless such notice is excused under Section 12(d) due to the Employer having "knowledge" of the work-relatedness of the injury during the filing period.

I further find that Employer knew in 2001 that Claimant alleged his arthritic right knee was injured and/or aggravated by work activities.[11] Employer also knew that Claimant suffered a similar arthritic condition in his left knee, as shown in the September 11, 2001 pre-operative admission report by Dr. Hajj. However, the record does not establish that Employer knew or should have known that Claimant's left knee injury was caused or aggravated by work activities or by the work-related right knee injury. I cannot determine if or when Employer received Dr. Johnson's June 4, 2002 letter, which would have led a reasonable person to conclude that investigation into the left knee was warranted. Absent evidence that Employer knew of any facts suggesting that the left knee injury was work-related, I cannot find that Claimant's lack of notice is excused under the "knowledge" prong of Section 12(d). I therefore find that Claimant's lack of timely notice was not excused by reason of Employer's "knowledge" of the injury within the statutory period.

Claimant argues that he did not need to provide Employer with separate notice of the left knee injury because it arose out of the same injurious conditions as the right knee injury, and/or it was aggravated by an altered gait that Claimant suffered due to the properly noticed right knee injury. Claimant relies primarily on two cases to support the contention that a claimant does not need to provide notice of each and every injury that grows out of a timely noticed injury.

I find that Claimant's reliance on *Alexander v. Ryan Walsh Stevedoring,* 23 BRBS 185, 187 (1990), *vacated and remanded on other grounds*, 927 F.2d 599 (5th Cir. 1991), is misplaced. In *Alexander*, the BRB precluded the employer from asserting any Section 12 defense due to the distinguishing fact of the employer's failure to raise this defense during the first hearing before the Administrative Law Judge ("ALJ"). *Alexander, supra*, at 187. Here, Employer has raised a timely Section 12 defense before me.

Claimant also relies on *Thompson v. Lockheed Shipbuilding & Construction* 21 BRBS 94 (1988). In *Thompson*, the claimant gave the employer proper notice of an accident and resulting ankle injury. *Id.* Claimant had ankle surgery and subsequently developed a lower back problem while recovering from the surgery. *Id.* The ALJ found that the claimant's lower back problem was caused by claimant's ankle surgery. *Id.* The BRB affirmed the ALJ's finding that the Claimant had given timely notice of his ankle injury, holding that the back injury arose out of the ankle injury and therefore no separate notice of the back injury was necessary, as "his back condition . . . did not arise from a separate accident." *Id.* at 96. In *Thompson*, one of the main reasons the BRB was willing to find that notice of the first injury was sufficient for notice of the second injury was because employer would have been able to investigate the "circumstances surrounding claimant's accidental injury." *Id.* at 96. Aside from that one comment, the BRB in *Thompson* did not explain why notice was excused under the circumstances. The BRB did, however, cite two cases in support of their finding, and an analysis of these cases helps to explain the reasoning behind the *Thompson* decision.

The first case cited by the BRB in *Thompson* is *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149, 152 (9th Cir. 1985). *Long* does not specifically address the notice issue and instead held that a claimant may not receive scheduled benefits for impairment to limbs which result

[11] I can infer that Employer knew that the right knee injury was alleged to be work-related by the facts that Claimant filed a timely claim for benefits due to the right knee injury and subsequently received benefits for that condition.

from prior injury to an unscheduled body part (the back). *Long*, 767 F.2d at 1583. The *Long* case shows that there are circumstances where an additional injury that is found to have grown out of a properly noticed work injury or accident would not need separate notice. However, the case does not provide what these circumstances are, as the notice issue was not discussed.

In the second case, *Jackson v. Ingalls Shipbuilding Division*, 15 BRBS 299 (1983), the BRB addressed the notice issue and excused the claimant from providing separate notice because he was able to show that the employer had *knowledge* of the facts surrounding the injury or death through the claimant's timely filing for the first injury. *Id.* at 299-305. This indicates that the BRB in *Thompson*, although not expressly stating as much, was actually excusing the claimant's lack of notice under the knowledge prong of Section 12(d). Viewed in this context, Claimant here, by citing these cases, is essentially arguing that Employer had "knowledge" of the work-related injury. As explained above, however, I found that Employer did not have knowledge of the work-relatedness of the left knee injury during the applicable filing period (within 30 days of June 17, 2003). I therefore reject Claimant's argument.

2. Employer Has Not Proven It Was Prejudiced by the Lack of Notice

Section 12(d) also excuses Claimant where the lack of notice does not prejudice the Employer. 33 U.S.C. § 912(d). Prejudice is established if an employer can show that, due to a claimant's failure to provide the written notice required by sections 12(a) and (b), it has been unable to effectively investigate the nature and extent of the alleged illness or to provide medical services. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991) (employer had 7.5 months before hearing to arrange for an independent medical exam and access to medical records fully documenting the nature and extent of claimant's injury). Most courts have held that it is the employer's burden to show prejudice. *See Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273 (9th Cir. 1998), *cert. denied* 525 U.S. 1102 (1999). Evidence that lack of timely notice impeded the employer's ability to determine the nature and extent of the injury or to provide medical services is sufficient; a conclusory allegation of prejudice is not. *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273 (9th Cir. 1998). *See also ITO Corp. of Baltimore v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (5th Cir. 1989) (finding that the determinations by the ALJ and BRB that the employer was not prejudiced by lack of timely notice were supported by substantial evidence as the only suggestion of prejudice the employer advanced was a general one of "no opportunity to investigate the claim when it was fresh.").

In support of the contention that it suffered prejudice due to Claimant's late notice, Employer cited *Kashuba v. Legion Insurance Co.,* 139 F.3d 1273 (9th Cir. 1998), *cert. denied* 525 U.S. 1102 (1999). In *Kashuba*, Employer received notice of the claim four months after the claimant suffered an accident allegedly injuring his back and nearly six weeks after the claimant had undergone back surgery. There were questions about whether the accident actually occurred and, if it did, whether it occurred while claimant was employed by the employer. *Id.* The BRB also noted that had the employer been notified of the injury earlier, it may have been able to produce specific and comprehensive evidence to sever the presumed connection between the claimant's back injury and his employment. *Id.* at 1276 (citations omitted).

In contrast, Claimant here gave notice to Employer *before* having surgery on the left knee --in fact the notice was in the form of a request for a second opinion of a doctor's recommendation that the Claimant have left knee surgery. Consequently, Employer was not prejudiced by not having time to obtain a second opinion prior to surgery. Also, there are no credibility issues concerning whether the activities that purportedly caused Claimant's left knee injury actually occurred.[12] I find that Employer has not proven that Claimant's lack of notice precluded Employer from collecting "specific and comprehensive evidence" which might have shown that Claimant's left knee condition was not caused by his work activities or his altered gait following the September 11, 2001 right knee surgery.

Employer argues it was prejudiced because Claimant left its employ in September 2001 and did not provide Employer with notice of the injury until June of 2003. TR at 47. Employer's counsel argued during opening statements that the evidence would show that Employer was unable to monitor any changes in Claimant's left knee, obtain MRI films, test the fluid in the knee, or perform exploratory surgery during this time. TR at 47. Employer's counsel further argued that the evidence would prove that Employer could not ascertain what percentage of Claimant's left knee condition was work-related and what percentage was due to Claimant's activities subsequent to leaving their employ. TR at 48. I find Employer's counsel's allegations during opening statements are insufficient to prove prejudice to Employer under subsection 12(d)(2) of the Act.

In this case, the relevant time period in which Employer must demonstrate prejudice is the time between Claimant's date of awareness of the work-relatedness of his left knee injury in June 2002 (which triggered his obligation to provide notice), and the date notice was given in June 2003. Given Employer's receipt of timely notice of Claimant's right knee injury, which is the same type of injury which Claimant alleges with respect to his left knee, Employer had the opportunity during this period to investigate Claimant's work conditions, activities, and cumulative trauma claim. Employer was also in possession of Claimant's August 30, 2002 deposition testimony regarding his past medical providers, employment, job duties and pre- and post-injury activities. *See* EX 17. Employer was also able to have Claimant examined and his medical records reviewed by Dr. London, who provided information about Claimant's left knee condition which Employer could have investigated further if it saw fit. *See* EX 3, 24. It is thus apparent that Employer's investigation of Claimant's earlier right knee injury put it in possession of significant and probative information concerning Claimant's working conditions, left knee condition and post-employment activities prior to June 2003. Additionally, Employer did not put forward any witness testimony or other evidence in support of its claim that it was unable to effectively investigate the left knee claim due to untimely notice. Under these circumstances, I find that Employer has failed to produce substantial evidence that it was prejudiced by Claimant's lack of timely written notice of the left knee injury.

I further find that Employer has not shown that it was prejudiced by an inability to investigate the connection between Claimant's left knee condition, work conditions and subsequent non-work-related activities. Employer submitted specific evidence regarding

[12] There are contrary reports as to how Claimant's work activities affected the left knee, but both parties seem to generally agree on what activities Claimant performed at work.

Claimant's involvement with karate and, as the BRB noted in its decision and order remanding this case to me, "the record is replete" with references to claimant's other activities including line dancing, motorcycle riding, which he had engaged in for many years before his right knee surgery. *See* TR at 77, 79, 93, 100. I find that Employer has not presented any witness testimony or documentary evidence showing that it was prejudiced by not being able to monitor the effect that these activities had on Claimant's left knee. I further find that there is no evidence which indicates that any of the above-mentioned activities constituted intervening causes severing the causal connection between the left knee condition and Claimant's employment.

In sum, the employer bears the burden of establishing that prejudice resulted. *Kashuba*, 139 F.3d at 1275. "Evidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient; a conclusory allegation of prejudice is not." *Id.* at 1276. In this case, Employer's allegations are little more than bald assertions of prejudice unsupported by the evidence of record. Accordingly, and for all of the reasons above, I find that Claimant did not provide timely notice as required by Section 12(a) but that Section 12(d)(2) excuses Claimant's lack of notice because Employer failed to meet its burden of establishing that prejudice resulted.

THE SECTION 13 ISSUE

Alternatively, Claimant has the burden of establishing the elements of Section 13. *George v. Lykes Bros.*, 7 BRBS 877 (1978). Section 13 must be read in conjunction with Sections 30(a) and 30(f) of the LHWCA. *Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1989). Section 30(a) requires that an employer submit to the Secretary of Labor a report of a claimant's injury within ten days of the date it has knowledge of that injury. 33 U.S.C. § 930(a). Section 30(f) tolls the filing period under Section 13 until the employer complies with the requirements of Section 30(a). *See Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). However, Section 30(f) of the LHWCA does not toll the limitations period of Section 13(a) if Employer was not given notice of the work-relatedness of the injury. *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (D.C. Cir. 1987).

The question of whether a claim was timely filed under Section 13 relates to when the Claimant knew, or had reason to know, that his injury was likely to impair his earning capacity. Merely seeking treatment, experiencing pain, or knowing of a possible future need for surgery, is legally insufficient to trigger the running of the one-year limitations period. *Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20 (4th Cir. 1991). This so-called "awareness standard" is the same for Section 12 and Section 13. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

Here, my prior finding that Claimant, in the exercise of reasonable diligence, should have been aware that his left knee injury was work-related and potentially disabling on June 4, 2002 is controlling for purposes Section 13 also. As such, Claimant's filing of a claim on July 3, 2003 was outside the one year limitations period for Section 13. However, the record does not indicate that Employer ever complied with Section 30(a) through filing a report of Claimant's injury with

the Department of Labor. Therefore, I find the statute of limitations in Section 13 was tolled under Section 30(f), and that the Claimant's claim is not barred under Section 13.

CAUSATION

Having found that Claimant's claim for disability compensation is not time-barred by either Section 12 or Section 13 of Act, I must consider Claimant's entitlement to disability benefits related to his left knee condition.

a. Medical Benefits

In my prior Decision, I addressed causation with respect to Claimant's claim for medical benefits. I determined that Claimant was entitled to the section 20(a) presumption that his left knee condition is work-related, that employer established rebuttal thereof, and that substantial evidence establishes that Claimant's left knee condition was aggravated by his employment activities with employer in September 2001, but not by his altered gait and use of a walker and cane following the September 11, 2001 surgery for the right knee condition.[13] *See* Decision and Order at 23, 25. Thereafter, in response to requests for reconsideration by both Claimant and Employer, I modified my prior Decision to reflect that: Employer is not liable for medical benefits prior to June 17, 2003, the date on which it first received written notice of Claimant's work-related left knee condition; that Dr. Hajj's December 27, 2001 report and deposition testimony do not show that Dr. Hajj opined any earlier than March 2003 that Claimant's work with Employer caused or aggravated his left knee condition; and that Claimant stipulated to Employer's proposed date of August 18, 2003 as the beginning date of temporary total disability due to his left knee condition. The BRB affirmed my findings with respect to Claimant's entitlement to medical benefits, and those findings are not disturbed here

b. Disability Benefits

A worker's injury is not compensable unless the injury arose out of and in the course of employment. *See* 33 U.S.C. § 902(2). If a claimant sustains an injury at work followed by a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural consequence or unavoidable result of the original work injury. *Lewis v. Norfolk Shipbuilding and Dry Dock Co.*, 20 BRBS 127 (1987); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980).

Claimant contends that his left knee injury was caused, accelerated, or aggravated by his employment activities with Employer and/or due to his altered gait following his work-related right knee arthroplasty surgery. Employer disputes that Claimant's left knee condition was caused or aggravated by his work activities or by his recovery from right knee surgery. In the alternative, Employer contends Claimant's line dancing, karate, and/or motorcycle riding were intervening causes for his condition which sever its liability for the left knee injury.

[13] In my prior Decision, I noted that a claim for medical benefits is never time-barred. *Colburn v. General Dynamics Corp*., 21 BRBS 219, 222 (1988); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); Winston v. Ingalls Shipbuilding, Inc. 16 BRBS 168 (1984).

For the same reasons that I found in my prior Decision that Claimant's left knee condition was aggravated by his employment activities with Employer through September 2001 for purposes of his entitlement to medical benefits, I further find herein that Claimant is entitled to disability benefits related to his left knee condition.

1. The Section 20(a) Presumption Has Been Invoked

In determining whether an injury is work-related, Claimant is aided by the Section 20(a) presumption if he can establish a prima facie case, i.e. that he suffered a harm and conditions existed or a work accident occurred which could have caused the harm. *See U.S Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 6312 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (5th Cir. 1998). Under *Brown v. I.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990), Claimant need not prove the pre-requisites by a preponderance of the evidence but need only show "some evidence tending to establish" those pre-requisites. Once the prima facie showing is made, section 20(a) creates a presumption that the injury arose out of employment. To rebut the presumption, an employer must present specific medical evidence severing the connection between the physical harm and working conditions. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). If the presumption is rebutted, the administrative law judge must weigh the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.,* 14 BRBS 927 (1982). The ultimate burden of proof rests on the claimant. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

It is undisputed that Claimant suffers from osteoarthritis in his left knee, thereby establishing that he suffered a physical harm. In seeking to establish the second element of his prima facie case, Claimant asserts that his left knee injury was aggravated by work activities with Employer and/or grew out of a compensable work-related right knee injury and surgery.

The evidence tends to establish that while working for Employer, Claimant was exposed to conditions could have aggravated his left knee condition. Claimant was employed by Employer from 1990 to 2001, and testified that the pain in his left knee began sometime between 1997 and 1999. EX 17 at 282; TR at 67. According to Dr. London, osteoarthritis could be aggravated by certain activities such as jumping, running, changing directions or resistance exercise with weights. EX 24 at 10, 21. Claimant testified that his work activities involved climbing, kneeling and squatting, all of which are activities that would place strain on one's knees similar to weight resistance training or changing directions. Lastly, Dr. Hajj indicated in December 2001, that Claimant's work activities with Employer aggravated the osteoarthritis in his knees. EX 19 at 14-15.

The evidence also tends to establish that Claimant's left knee condition was aggravated during his recovery from the September 11, 2001 surgery for his work-related right knee injury. Claimant had a carpal tunnel release surgery on his right wrist contemporaneously with the September 11, 2001 right knee total arthroplasty. TR at 68. Following the right knee surgery, Claimant was unable to place much weight (if any) on his right knee and had to use a walker which was specially designed with an extension on the right arm pad to accommodate his post-surgery right hand. TR at 68. Claimant testified that he placed almost all of his weight on his left

leg for this period. TR at 69. He testified that he used a cane for about a month following the walker and suffered from an altered gait that he retains to this day. TR 71, 73. His altered gait and his testimony about how he relies more heavily on his left leg tend to establish that his left knee injury was at least partly aggravated or caused by his right knee injury. *See* EX 9 at 25; EX 19 at 460, 492; CX 2 at 19-22. I find that this evidence is sufficient to support a prima facie showing and invoke the Section 20(a) presumption.

2. Employer Has Rebutted Section 20(a) Presumption

Once a claimant has invoked the presumption, the burden shifts to the employer to rebut it with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 14 (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co.*, Inc., 30 BRBS 45, 46-47 (1996). When a doctor's testimony and reports unequivocally state his opinion, rendered within a reasonable degree of medical certainty that the claimant's condition is not work-related, employer has produced evidence sufficient to sever the causal relationship between a claimant's employment and his harm. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000). The doctor does not need to "rule out" all other causes or give his opinion with "absolute certainty." *Id.* at 42.

Employer relies primarily upon the medical testimony of Dr. London to rebut Claimant's claims that the left knee injury was linked to (1) the work activities at Kinder Morgan, or (2) Claimant's recovery from the compensable right knee injury and surgery.

Regarding whether the work activities caused or aggravated Claimant's left knee conditions, Dr. London testified that he could state to a reasonable degree of medical certainty that Claimant's work activities with Employer did not *cause* the osteoarthritis in Claimant's left knee. EX 24 at 11-12. However, this opinion does not address whether the work activities *aggravated or accelerated* Claimant's left knee condition. Under the "aggravation rule," an employer is liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45 (5th Cir. 1986).

Dr. London did address the aggravation issue in his October 11, 2003 report, wherein he stated that Claimant "did not start to complain of symptoms referable to his left knee until long after he worked for [Employer]. In my opinion, if he had aggravated, worsened or injured his left knee while he was working at [Employer] he would have complained of symptoms to both knees." EX 4 at 96. Dr. London testified that he would usually expect to see an increase in pain, swelling, stiffness and limitation of motion if the left knee condition had been aggravated. EX 24 at 22. He testified that Claimant had not complained that he suffered these symptoms in his left knee while he was employed with Employer. EX 24 at 39-40.

Dr. London was familiar with Claimants work activities which he described as "active physical work" involving lifting, carrying, climbing, squatting, and working in awkward positions. *Id.* Dr. London testified that this active, physical work would have caused stress in Claimant's hips and ankles and, had such stress been the cause of the osteoarthritis, Dr. London would have anticipated similar injuries to Claimant's hips and ankles. EX 24 at 12. Dr. London

testified that the stress in the hip joints would actually have been greater in pounds per square inch than in the knee joint and therefore, had the left knee injury been caused by stress from the physical work, he would have expected a similar condition in Claimant's hip joints. EX at 15-16.

Dr. London testified that arthritis is primarily caused by genetics, often runs in families and is also linked to aging. EX 24 at 10. For mostly this reason, Dr. London opined that active physical work did not necessarily cause Claimant's osteoarthritis. EX 24 at 11. He stated if the left knee condition was "related to the stresses on the joints in his lower extremities, you would expect to see it in his hips and ankles; but instead we have . . . no symptoms referable to his hips or ankles, joints that are exposed to the same stresses as the knees." EX 24 at 15.

Dr. London saw Claimant again in October 2003 and Claimant complained of constant sharp pain in the anterior and posterior aspects of the left knee that occasionally radiated into the left buttock. EX 24 at 13. Claimant had not complained of constant pain or pain in the buttocks during his April 2003 examination. EX 24 at 13. Following the October 2003 exam, Dr. London agreed with Drs. Hajj and Kharrazi that Claimant needed a left total arthroplasty. EX 24 at 15.

I find that Dr. London's testimony and medical reports are adequate to rebut the section 20(a) presumption that Claimant's left knee condition was caused by his work activities.

As to whether Claimant's left knee injury was caused or aggravated by the altered gait following the September 11, 2001 surgery, Dr. London testified that during the time period that Claimant was using a walker, his left knee was probably subjected to significantly less stress because Claimant placed almost 50% of his weight on the walker. EX 24 at 14. He also opined that Claimant was less active after the surgery and used his left knee less then before the surgery. EX 24 at 14. Dr. London felt that Claimant's altered gait was very "short strided" and that such a short gait would not have aggravated his left knee. *Id.* I find that this testimony is sufficient to rebut the Section 20(a) presumption that Claimant's left knee condition was caused or aggravated by his recovery from the right knee surgery.

3. Weighing the Evidence

Since the Employer has successfully rebutted the Section 20(a) presumption of causation, the question of causation "must be resolved upon the whole body of proof pro and con." *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935). I first address whether Claimant's activities while employed with Employer aggravated or accelerated his left knee condition.

Dr. London testified that activities such as "where you jump or you come down hard on your leg, things where you do sudden resistance to your knee like rapid forceful lifting of weights" can aggravate an underlying osteoarthritic condition. EX 24 at 28. Dr. London referred to such activities as "impact loading." EX 24 at 31. He admitted that many of Claimant's work activities with Employer had potential to aggravate Claimant's left knee condition and that those activities had in fact aggravated the osteoarthritic condition in Claimant's right knee. *Id.*

Dr. London's opinion that, unlike the right knee condition, the left knee condition was not aggravated by Claimant's employment with Employer was premised upon the following two

assertions: (1) if the left knee condition was caused by stress from work activities, Dr. London would have expected to have seen similar problems with Claimant's ankles and hips; and (2) if the work activities had aggravated Claimant's left knee injury then Dr. London would have expected to have seen an immediate increase in symptoms and complaints related to the aggravation. I find neither of these arguments to be very persuasive for the reasons set out below.

Dr. London's claim that one would expect to see injuries to Claimant's ankles and hips if the left knee condition was caused by work activities is seemingly contradicted by Dr. London's own report dated March 13, 2002. *See* EX 3. In that report, Dr. London stated that Claimant's osteoarthritis in his right knee *was aggravated* by Claimant's work activities absent any complaints by Claimant of ankle or hip pain in relation to his right knee. *Id.* Dr. London does not offer a sufficient explanation for this discrepancy. I therefore do not afford much weight to his opinion on the importance of hip and ankle symptoms in relation to the left knee condition.

Dr. London's second assertion is that he would have expected immediate symptoms such as pain, swelling or stiffness if Claimant had aggravated his left knee condition. EX 24 at 32. Dr. London testified that Claimant never complained of increased left knee pain, stiffness or swelling caused by his work activities. The doctor therefore concluded that the left knee condition must not have been aggravated during this time. However, Dr. London saw Claimant for the first time five months after Claimant had ceased working for Employer.[14] EX 24 at 5. At that time, it is not only conceivable but probable that Claimant would have been more concerned with recovering from his right knee surgery than relating whether his left knee symptoms had grown worse during certain periods in the past versus other periods. Dr. London's report dated March 13, 2002 described the first examination and Dr. London does not indicate that he spoke with Claimant specifically about the continuity of his left knee symptoms while Claimant was employed with Employer. EX 3 at 29. This could indicate that Claimant was not asked whether his left knee symptoms progressed during the period he worked for Employer. As a result, I place little weight on Dr. London's assertions that Claimant never complained of left knee symptoms while working at Employer.

In contrast, there is substantial evidence that Claimant's left knee did in fact grow worse while he was employed by Employer. Claimant indicated that the pain in his left knee "began" while he was employed with Employer in 1999. TR at 167. Medical records reveal that Claimant sought treatment for both knees on many occasions during his employment, as shown below.

On July 17, 2000, Dr. B. Ted Field noted that Claimant said "both knees" felt very good after the series of Synvisc injections. EX 3 at 38. Likewise, on January 18, 2001, both of Claimant's knees were x-rayed by Dr. Gurpem S. Kang at the request of Dr. Hajj due to concerns Dr. Hajj had about both knees. EX 3 at 46; CX 10 at 16. Dr. Kang concluded that there were "[d]egenerative changes in both knee joints consistent with osteoarthritis. Right knee shows mild to moderate narrowing of the lateral compartment. Left knee shows mild to moderate narrowing of the medial compartment." *Id.* In February April of 2001, Dr. Hajj administered Synvisc injections to both knees due to Claimant's complaints of pain in his knees. CX 8 at 65.

[14] February 13, 2002.

In the September 11, 2001 admission records, Dr. Hajj noted that Claimant was "a 56-year-old gentleman who is known to have had traumatic arthritis in both knees for many years. He underwent previous debridement of both knees which gave temporary relief." EX 9 at 132. Similarly, Dr. Hajj's December 27, 2001 report refers to two prior surgeries that Claimant had had on his knees: "the first surgery was on the right knee in August of 1999 and the second surgery was on the left knee in January of 2000." EX 3 at 42.

Claimant began complaining about his left knee during the time he worked at Employer. In contrast to Dr. London, Drs. Hajj and Kharrazi opine that Claimant's left knee condition was aggravated by his work activities at Employer. EX 19 at 468, 485-86.

Dr. Hajj first examined Claimant while he was still working with Employer. He later testifying that Claimant's left knee condition was aggravated by work activities with Employer. CX 10 at 6. Dr. Hajj stated that "the nature of the work he was doing, the activities he had to do at work had caused more stress on his knees, and that's what contributes to arthritis." *Id*. Dr. Hajj testified that most activities aggravate arthritis including simple walking, sitting and standing. CX 10 at 20.

The persuasiveness of Dr. Hajj's opinion is somewhat lessened by the fact that he only concluded in writing that Claimant's left knee condition was related to his work activities after Claimant had ceased working for Employer. CX 10 at 59. Dr. Hajj admitted that he had not formed an opinion concerning causation of the left knee injury at the time he examined Claimant in January 2001. CX 10 at 59. However, Dr. Hajj had formed the opinion in January 2001 that the osteoarthritis in the right knee was work-related, and he explained that no one had asked him about the left knee at that time. CX 10 at 59. I credit Dr. Hajj's testimony that, had he been asked in January 2001 whether the left knee injury was work-related, he would have said yes because Claimant basically had the same problem in both knees. CX 10 at 59.

Dr. Kharrazi also stated that Claimant's left knee condition was aggravated by his work activities at Employer. CX 2 at 26. In his July 7, 2003 report, Dr. Kharrazi indicated that he understood the physical requirements of Claimant's former job to include prolonged standing, bending, stooping, climbing and descending tanks, repetitive movement of the upper/lower extremities, lifting and carrying objects weighing up to 150 lbs. CX 2 at 20. These are consistent with the job activities that Claimant testified to performing. *See* TR at 62; EX 17 at 393.

Lastly, Dr. London testified that Claimant's left knee condition as of April 2003 was not something that would have developed overnight or even over one or two years. EX 24 at 25. He believed it was likely that the left knee condition began five to seven years prior to that date. *Id.* This testimony by Dr. London would further indicate that Claimant's left knee probably started deteriorating during the time he was working with Employer.

After weighing all relevant evidence, I find that there is substantial evidence to indicate that the left knee condition was aggravated by Claimant's employment activities with Employer prior to his last day of employment in September 2001. The parties have stipulated that Claimant's temporary total left knee disability for compensation purposes began on August 18, 2003 and that his compensation rate is $850.00 per week. Stip. Fact No. 3 and 8. In addition, the

parties stipulated that Claimant has not reached maximum medical improvement with respect to his left knee injury. Stip. Fact No. 4. As a result, I find that Claimant is entitled to recover from Employer temporary total disability compensation benefits at the weekly rate of $850.00 from August 18, 2003 and continuing into the future.

I next address whether Claimant's left knee injury grew naturally out of the right knee injury and altered gait following the September 11, 2001 surgery to Claimant's right knee. Following the September 11, 2001 surgery, Dr. Hajj examined Claimant approximately 23 times. EX 9 at 25. Dr. Hajj testified that Claimant's left knee condition was aggravated by his "right knee total arthroplasty with significant limping." EX 9 at 25. He testified that the symptoms in the left knee became more pronounced following Claimant's September 11, 2001 surgery "due to Claimant not being able to place normal weight on his right knee resulting in greater weight and stress upon Claimant's left knee." EX 19 at 460. Dr. Hajj also testified that the altered gait "accelerated the timing of a need for surgery on [Claimant's] . . . left knee." EX 19 at 495.

However, Dr. Hajj did not discuss a potential causal link between Claimant's right knee surgery and his left knee condition until March 18, 2003. EX 19 at 481. Additionally, Dr. Hajj testified that he was not aware that Claimant participated in strenuous activities such as karate following the September 11, 2001 surgery. EX 19 at 476. He stated that, had he known Claimant was involved in karate, "that would of course maybe change my opinion about what could have caused his left knee pain." *Id.* I find Dr. Hajj's opinion that the left knee was caused by the altered gait due to the right knee surgery not very credible as it was not offered until 2003 and due to Dr. Hajj's lack of awareness of Claimant's post-September 11, 2001 activities.

Not until July 7, 2003 did Dr. Kharrazi conclude that Claimant's left knee had been aggravated by his altered gait following the right knee surgery. He stated in his report on that date that:

> The patient has had a right total knee arthroplasty for an industrial injury to his right knee. I do believe that the patient at this time has developed significant compensatory left knee pain secondary to his right knee total arthroplasty with significant limping. Although he had pre-existing degenerative chondromalacia of the left knee, I do believe his symptoms have significantly accelerated due to his right knee industrial injury and he has developed significant left knee pain.

CX 2 at 25.

However, Dr. Kharrazi's report does not mention that Claimant participated in line dancing, karate or motorcycle riding, and it is not clear if the doctor was aware that Claimant participated in these activities. *See* CX 2. Also, the report says that Claimant related to Dr. Kharrazi that he first began feeling pain in his left knee around January 2003 and that he attributed this pain to his favoring his left knee after the right knee surgery. CX 2 at 20. This date contradicts Claimant's earlier testimony that his left knee began hurting as early as 1999. Dr. Kharrazi's 2003 report also fails to indicate that he reviewed medical records from before 2003. I find that Dr. Kharrazi's opinion on this issue is less credible because he did not review the entire left knee medical history and was unaware of Claimant's activities outside of work which may

have aggravated his left knee condition, rather than the use of a walker, cane or the altered gait following the right knee surgery.

There is little in the way of objective evidence to support a finding that Claimant's altered gait from the right knee surgery aggravated or caused Claimant's left knee condition. Claimant's own doctor, Dr. Hajj, admitted that there was no significant difference between the x-rays of Claimant's left knee before the surgery (January 2001) and those taken nearly a year after the surgery (November 2002).[15] EX 19 at 494. Dr. Hajj tried to explain how arthritis can advance without revealing degenerative changes on an x-ray, stating that "when the arthritis is advanced . . . I don't think you are going to see that much difference in six months or even a year on the x-ray . . . so you just have to go with the patient's symptoms." *Id.*

If this last statement were true and the left knee was aggravated by Claimant using a walker and having an altered gait, then one would not expect to see a sudden worsening between November 2002 and July 2003. However, the record does in fact reveal that such a change occurred. Dr. Kang concluded from the January 18, 2001 x-rays that Claimant suffered "[d]egenerative changes in both knee joints consistent with osteoarthritis . . . . Left knee shows *mild to moderate narrowing* of the medial compartment." EX 3 at 46 (emphasis added). Dr. Hajj testified that Claimant's left knee x-rays of November 2002 did not reveal any significant changes, indicating that the medial compartment narrowing was still mild to moderate. EX 19 at 494. A mere eight months later, Dr. Kharrazi's report concerning x-rays taken on July 7, 2003 described the medial compartment narrowing as "*almost bone on bone*." CX 2 at 25. I find that this evidence shows that Claimant's left knee became significantly worse sometime between November 2002 and July 2003. This discredits Dr. Hajj's opinion that Claimant's left knee worsened immediately after the right knee surgery and that it was partly caused by the Claimant's use of a walker and/or cane and resultant altered gait.

Dr. London testified that during the period that Claimant was using a walker immediately after the right knee surgery, Claimant's left knee was probably subjected to significantly less stress because Claimant placed almost 50% of his weight on the walker and was less active after the surgery and thereby used his left knee less then before the surgery. EX 24 at 14. Dr. London felt that Claimant's altered gait was a very "short-strided gait on both sides because he had pain on both sides" and that such a short gait would not have aggravated his left knee. *Id.* I find this testimony to be convincing especially considering the lack of objective evidence to support a finding that Claimant's left knee worsened due to an altered gait or use of a walker or cane following the September 11, 2001 surgery. Dr. London also previously testified that certain "impact loading" activities aggravated arthritis such as "where you jump or you come down hard on your leg, things where you do sudden resistance to your knee like rapid forceful lifting of weights." EX 24 at 28. Whereas I found above that many of Claimant's work activities with Employer had the potential to aggravate Claimant's left knee condition, I do not find the same to be true of Claimant's altered gait and use of a walker/cane following the right knee surgery.

After considering all of the evidence, I find that the record does not support a finding that Claimant's left knee injury was aggravated by his altered gait and/or use of a walker and cane

[15] Dr. Hajj testified that his chart notes reflect a second set of x-rays in November 2002 and that these x-rays did not reveal a significant difference in the left knee. TR at 66.

following the September 11, 2001 surgery. These activities were not impact loading, there is no objective evidence to support a finding that the left knee condition grew worse due to the right knee surgery, and lastly, neither Drs. Hajj or Kharrazi seem to have concluded that there was a causal link between Claimant's right knee and left knee injuries until asked about the possibility in 2003 by Claimant's attorney.

4. Intervening Cause

Employer next contends that even if it is found liable for aggravation of Claimant's left knee injury, Claimant's non-employment activities, including karate, motorcycle riding and line dancing, worsened Claimant's left knee condition, thereby severing any liability it may have had.

It is necessary that the employee show that the injury arose only in part from the employment to be compensable. *Brown v. District of Columbia Dept. of Employment Services*, 700 A.2d 787, 792 (D.C. App. 1997) (citations omitted). The law of intervening causes asks whether the disability is causally related to, and is the natural and unavoidable consequence of, the claimant's work-related accident or whether the subsequent incident constituted an independent and intervening event attributable to the claimant's own intentional conduct, thus breaking the chain of causality between the work-related injury and any disability the employee may be experiencing. *See Hayward v. Parsons Hospital*, 32 A.D.2d 983 (N.Y. 1969). The subsequent disability is still compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances. *Id.*

In this case, none of the doctors testified that the left knee surgery was not a natural and unavoidable consequence of Claimant's left knee condition. Nor did any doctor testify that Claimant's ongoing participation in karate, line dancing or motorcycle riding did not constitute an independent cause of Claimant's left knee condition.

Employer offered the testimony of Dr. London, who watched the tapes of Claimant's sixth degree karate test and testified that similar activities "over time could aggravate the left knee condition." EX 24 at 16-17. However, Dr. London seemingly contradicted himself when he testified that Claimant's activity level may have actually helped his knee condition. EX 24 at 20. He testified that:

> there's a general . . . belief that if you keep using your knees, you're wearing away at the cartilage in your knees something like you wear away the leather on the bottom of you're shoe; there's a dramatic difference between the cartilage in your knee and the leather . . . . The cartilage is alive and has a capacity – like other musculoskeletal tissues, the cartilage has the ability to respond and actually get stronger to the stresses and strains placed on it . . . [BUT] cartilage is collagen and the collagen gets more dense and stronger when you exercise. That's true in arthritic joints. It's true in normal joints.

EX 24 at 20.

Dr. London testified that activities such as walking, normal stair climbing, getting into and out of a car, bending often strengthen the knee. EX 24 at 21. He said that impact loading activities such as jumping, cutting, running, changing directions resistance exercise with weights "exceed the limits that arthritic cartilage can tolerate and will aggravate the underlying condition." *Id.* Dr. London does however clarify why he opines that karate would aggravate Claimant's left knee. After watching the video, I found that the activities during Claimant's test were more similar to walking and bending over than running or weight lifting. Claimant did not make any of the kicks typically required to pass the test. The position changes were minimal and did not appear to involve jumping or cutting or running activities.

Other than Dr. London, whose opinion I rejected in the preceding paragraph, there was no testimony that any of Claimant's physical activities were likely independent causes of his left knee condition. As a result, I find that there is insufficient evidence to find that Claimant's engaging in karate, motorcycle riding and/or line dancing were independent causes of the Claimant's left knee condition which would sever Employer's liability for the left knee condition.

MEDICAL BENEFITS

Section 7(a) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment […] for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv*., 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc*., 21 BRBS 33 (1988).

As I find that there was no intervening cause and medical benefits are never time barred, and consistent with my prior Decision and my subsequent order modifying my prior Decision, I find and conclude that Employer is responsible for all reasonable and necessary medical expenses stemming from the work-related left knee injury, including a left knee arthroplasty if and when it becomes necessary.[16]

[16] Dr. Johnson's June 4, 2002 letter referenced that Claimant would soon need left knee replacement surgery. EX 10 at 135-36. Dr. Hajj testified that he believes Claimant needs a partial or total left knee arthoplasty in the near future as all other conventional medical treatment has not worked. EX 19 at 485-6. Dr. London testified that such an arthroscopic surgery would be a waste of time. EX 24 at 23. Specifically he stated that "[t]he chances of [Claimant] benefiting from that surgery are slim to none. Once an individual gets down to a 2-millimeter joint space, with areas of exposed bone on bone contact this surgery is a waste of time." *Id*. Dr. London also indicated that Claimant may need a total knee replacement but that the timing of such would be left to Claimant insofar as the doctors wait to see how long Claimant can function before resorting to such a surgery. EX 24 at 245.

CONCLUSION

In sum, I find on remand that Claimant's claim for disability is not time-barred under Section 12 because, despite his giving Employer late notice, Claimant was excused under Section 12(d)(2) where Employer has failed to meet its burden of establishing that prejudice resulted from the late notice. I further find that the statute of limitations contained in Section 13 was tolled under Section 30(f). In addition, I find that Claimant's left knee injury was aggravated or accelerated by his work activities at Employer and that Claimant's temporary total disability commenced on August 18, 2003 and is continuing. I further find that there is insufficient evidence on which to conclude that Claimant's left knee was aggravated while he was recovering from the work-related right knee surgery. Claimant is therefore entitled to recover temporary total disability benefits at the compensation rate of $850 per week from August 18, 2003 and continuing into the future, and reasonable medical benefits for the left knee from July 17, 2003 and continuing, including a left knee arthroplasty if and when it becomes necessary. Finally, Claimant's counsel is entitled to recover his reasonable attorneys' fees and costs under section 28 of the Act.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant temporary total disability compensation benefits at the weekly rate of $850.00 from August 18, 2003 and continuing for his left knee condition.

2. Employer shall provide such reasonable medical treatment for Claimant's left knee including past expenses from June 17, 2003 and continuing, including a left knee arthroplasty and as described in this decision.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

4. The District Director shall make all calculations necessary to carry out this Order.

5. Counsel for Claimant shall within 20 days after service of this Order submit, to counsel for Employer and to the undersigned Administrative Law Judge, a response to Employer's objections for fees and costs incurred through March 23, 2005 and a fully supported application for costs and fees for any additional attorneys' fees and costs sought from March 24, 2005 to the present. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to any newly proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs,

Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

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Gerald M. Etchingham
Administrative Law Judge

San Francisco, California